IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1742

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, AND UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN IRON AND STEEL INSTITUTE AS AMICUS CURIAE

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STATEMENT OF INTEREST

This case involves the review of regulations of the Environmental Protection Agency [the "Agency"] establishing procedures for the approval of state im-

plementation plans under the Clean Air Act of 1970, 42 U.S.C. § 1857 *et seq.* [the "Act"] which include provisions authorizing the states to grant interim variances from state plans pursuant to the revision authority of section 110(a)(3) of the Act, 42 U.S.C. § 1857c-5(a)(3), prior to the effective date of the Act's mandatory attainment of primary ambient air quality standards. Five Circuit Courts of Appeals have reviewed this question. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 489 F.2d 390 (5th Cir. 1974); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 494 F.2d 519 (2d Cir. 1974); and *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, No. 72-2145 (9th Cir. Nov. 11, 1974). Four circuits, the First, Second, Eighth and Ninth, have upheld the Agency's authority to approve state implementation plans providing for state interim variance procedures, while one circuit, the Fifth, denied that the Agency has such authority. This Court's interpretation of the Clean Air Act in this instance will have significant impact on industry and governments at all levels by affecting substantial procedures now being followed to produce cleaner ambient air environment.

The American Iron and Steel Institute respectfully files this brief as *amici curiae* due to the concern of its members that affirmance of Fifth Circuit's decision will prohibit improved or expeditious methods of achieving the prescribed standards of the Act. Writ-

ten consent of the parties to file a brief *amicus curiae* has been obtained under Supreme Court Rule 42.2.

The American Iron and Steel Institute [hereinafter "Institute"] is a non-profit trade association incorporated under the laws of the State of New York with principal offices at 1000 Sixteenth Street, N.W., Washington, D. C. The Institute consists of 65 member companies in the United States which employ over a half million hourly and salary people, and account for more than 95 percent of the steel produced in America.

The Institute's members are and have been subject to the standards of the Act, *see, e.g.*, 40 C.F.R. §§ 60.160-60.144 (1974), and have contributed their planning and financial resources to programs premised upon the authority of the Agency to approve states' variances from previously approved state implementation plans. To disallow this authority would thwart the full thrust of the Act and cripple the intent of the Congress. Variances to implementation plans within the terms of section 110(a)(3) are essential if the combined efforts of industry and government are "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population". 42 U.S.C. § 1857(b)(1). Significant progress has already been made toward reaching these goals and variances have played an integral role in the planning and implementation of the Act's goals. To eliminate this useful administrative tool by preventing the revision of certain implementation plans will severely handicap the industries and governments who are compelled to meet the standards of the legislation.

Accordingly, the Institute is vitally concerned with and would be immediately affected by a decision which would deny the authority of the Agency to approve interim variances granted by the states under implementation plans developed pursuant to the Act and the Agency's regulations.

In the opinion of the members of amicus, economic, technological and practicable conditions in the iron and steel industry and the communities served by the members, generally would be best served by continuing the Agency's present procedures of approving variances in state implementation plans under the Agency's revision authority, delineated in section 110(a)(3) of the Clean Air Act. 42 U.S.C. § 1857c-5(a)(3).

SUMMARY OF ARGUMENT

I

The Clean Air Act requires the Environmental Protection Agency—which it already has done—to establish national primary and secondary ambient air quality standards establishing the maximum allowable concentration of pollutants in the ambient air environment. Subsequent to the promulgation of national standards, the states developed implementation plans pursuant to the Act which vests in them the primary responsibility for implementing and maintaining programs to meet the national ambient air quality standards. The Act provides that the Agency shall approve state plans to insure that state programs will meet national ambient standards by the deadlines established under Act, generally set for mid-1975. The Act in two sections, relevant here, provides for the approval of variances from state implementation plans. In sec-

tion 110(a)(3) the Agency is granted the authority to approve revisions in state implementation plans. 42 U.S.C. § 1857c-5(a)(3). In section 110(f) the Act provides a second type of variance in the form of postponements of up to one year in the effective date of an implementation plan. 42 U.S.C. § 1857c-5(f).

Under section 110(a)(2)(A), state plans implementing national primary air quality standards must provide "for the attainment of such primary standards as expeditiously as practicable but . . . in no case later than three years from the date of approval of such plan". 42 U.S.C. § 1857c-5(a)(2)(A). A state plan must further insure, under section 110(a)(2)(B), the maintenance of primary and secondary standards once they are reached by the state under section 110(2)(A). Thus, a state's implementation plan must provide for two periods of time: one when primary standards must be reached as expeditiously as practicable and a second when standards once attained must be maintained. In the first, or pre-attainment period, the Agency and states are given a degree of flexibility in revising state implementation plans. In the second, or post-attainment period, flexibility must give way to strict rules of compliance and variance therefrom. It is during this pre-attainment period in which the states are delegated, subject to Agency approval, the authority to grant variances in the form of revisions of state implementation plans, which has become the subject of this review. To deny the Agency's authority to grant revisions would be to severely handicap the states' ability to carry out their responsibilities as mandated by the Act. The postponement procedures, embodied in section 110(f), are applicable only to post-attainment problems, and thus are not controlling on

the Agency's authority to grant variances prior to the effective date of mandatory attainment of national ambient air quality standards.

II

The Clean Air Act in sections 110(c) and (d) provides that the Agency's procedures for approving state implementation are to be uniform. Throughout both sections, reference is made to the state hearing procedures (and agency procedures should the state fail to hold hearings) in terms of the implementation plan or revisions. While the legislative history is silent in this area, both sections 110(c) and (d) display a clear Congressional intent that revisions and original implementation plans must be treated uniformly.

An interpretation of the Act which permits the agency to approve interim state variances is consistent with the Court's holdings that in complex areas, such as solving the national air pollution control problem, federal agencies must have the flexibility to grant variances within the meaning of the relevant statutes. In the case of pre-attainment variances, judicial construction, tempered by reasonableness, must be applied to section 110 in order to insure flexibility by providing the Agency with the authority to approve state variances prior to the effective date of mandatory national ambient air quality deadlines. *United States* v. *Allegheny Ludlum Steel Corp.*, 406 U.S. 742 (1972).

III

The objectives of the Clean Air Act are best encouraged by upholding the Agency's authority to approve state implementation plans which provide for interim variance prior to the effective date of mandatory attainment standards. This conclusion is based on two overriding premises. First, as the four circuits sup-

porting the agency noted, the Agency's revision procedures encourage the states to impose strict air quality limitations now, subject to individual exceptions if warranted. If the revision power is unavailable, and only the postponement procedures of section 110(f) are applicable, the states would be forced to adopt less stringent standards in order to accommodate those who could not otherwise comply, notwithstanding reasonable efforts.

Second, the states and the Agency have been proceeding since enactment of the Clean Air Act under the assumption that the revision authority would be available and utilized. For the revision procedures now to be unavailable on the eve of the effective date of mandatory standards (generally set for mid-1975) would be to disrupt the entire environmental program by calling into question the delicate balance between state and federal roles. Moreover, unavailability of the revision procedures would cause irreparable injury to industries which have been striving, under state plans and revisions thereto, to meet the mandatory attainment deadlines.

ARGUMENTS

I. The States Are Not Pre-empted by the Clean Air Act from Granting Interim Variances Under the Act's Revision Authority Prior to the Effective Date of Mandatory Attainment Deadlines.

The Clean Air Act of 1970, 42 U.S.C. § 1857c-3 *et seq.*,[1] establishes a program of air pollution control involving three major stages. The first stage is the establishment of "ambient air quality standards", by the

[1] The Clean Air Act of 1970 substantially amended the Air Quality Act of 1967. 42 U.S.C. § 1857.

Agency designating the maximum tolerable concentrations of pollutants in the ambient air.[2] The second stage is the state development of plans to bring the states up to the national standards. State plans are subject to approval by the Agency. To be approved an implementation plan must provide for the attainment of primary standards "as expeditiously as practicable" but in no case later than three years from the date of approval of such plan, and the attainment of secondary standards within a "reasonable time". 42 U.S.C. § 1857c-5(a)(A)(i) and (ii). In approving a plan the agency must further take into consideration such other factors as *inter alia* monitoring systems land use and transportation control, not relevant here. During this second stage the Act provides that the agency shall approve revisions of a state plan if it meets the requirements set forth for an original implementation plan. 42 U.S.C. § 1857c-5(a)(3).

The third stage under the Act is the maintenance of ambient air quality standards after the effective date of mandatory deadlines. The deadline for state attainment of national standards may be postponed at the request of a state governor. The Agency may grant a postponment only after the holding of an adjudicatory

[2] The Act divides the standards to be established between primary standards which are maximums allowable to protect the public health, 42 U.S.C. § 1857c-4(b)(1); and secondary standards which are maximums tolerable to protect the public welfare from any known or anticipated adverse effects. 42 U.S.C. § 1857c-4(b)(2). Section 302 of the Act defines the public welfare as:

> (h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. 42 U.S.C. § 1857h(h).

hearing "on the record". 42 U.S.C. § 1857c-5(e) & (f). Under section 110(e) the Agency may extend the three year deadline for meeting the national primary standards for up to two years if requested by the governor when an implementation plan is submitted. 42 U.S.C. § 1857c-5(e). Section 110(f) further provides that the governor may request up until the effective date of the standard, a one year extension of the national primary standard deadline. 42 U.S.C. § 1857c-5(f).

The Act divides the responsibility for developing the programs to be applied in these three stages between the states and the federal government. In the first stage the Agency has the exclusive authority to establish national ambient air quality standards. 42 U.S.C. § 1857c-4(a). In the second stage the states have the primary authority, subject to Agency approval, to establish state implementation plans to achieve the standards set by the Agency.[3] 42 U.S.C. § 1857c-5(a). In the third stage the Act envisions shared responsibility between the state and federal government to insure that national standards once attained, are maintained. At this final stage, the Act provides strict limitations on exemptions to the standards of ambient quality once they have been obtained. 42 U.S.C. §§ 1857c-8 & d-1.

The Agency, as required by the Act, promulgated national ambient air quality standards on April 30,

[3] That the primary responsibility for solving the air pollution problem rests in the states has been a constant premise throughout the history of Congressional legislation in this area. See, *e.g.*, Air Quality Act of 1967, Pub. L. 90-145, 42 U.S.C. § 1857; Clean Air Act Amendments of 1966, Pub. L. 89-675, 42 U.S.C. § 1857; Clean Air of 1963, Pub. L. 88-206, 77 Stat. 342; Act of 1955, 69 Stat. 322.

1971 for six categories of "criteria pollutants".[4] 40 C.F.R. § 50 (1972). Accordingly 40 states, including Georgia, prepared and submitted implementation plans for approval by the Agency on January 31, 1972. 42 U.S.C. § 1857c-5. On May 31, 1972, the Agency approved portions of the Georgia state plan providing for exceptions to its implementation plan to firms who could not meet the standards within the deadline established in the state plan.[5] The Agency's approval of this portion of the Georgia plan was made pursuant to

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[4] At present, there are six categories of "criteria pollutants": sulfur oxides; carbon monoxide; nitrogen dioxide; the hydrocarbons; particulate matter; and the photochemical oxidants. See 40 C.F.R. § 50 (1972).

[5] Variances under the State of Georgia implementation plan are controlled by GA. CODE § 88-912 which provides:

> **88-912. Variances.** The Department may grant specific or general classes of variances from the particular requirements of any rule, regulation or general order to such specific source or general classes of sources of air contaminants upon such conditions as it may deem necessary to protect the public health and welfare, if it finds that strict compliance with such rule, regulation or general order is inappropriate because of conditions beyond the control of the person or classes of persons granted such variances, or because of special circumstances which would render strict compliance unreasonable, unduly burdensome, or impractical due to special physical conditions or causes, or because strict compliance would result in substantial curtailment or closing-down of one or more businesses, plants or operations, or because no alternative facility or method of handling is yet available. Such variances may be limited in time. In determining whether or not such variances shall be granted, the Department shall give consideration to the protection of the public health, saftey and general welfare of the public, and weigh the equities involved and the relative advantages and disadvantages to the resident and the occupation or activity affected. Any person or persons seeking a variance shall do so by filing a petition therefor with the Director of the Department. The Director shall promptly investigate such petition and make a recommendation as to the disposition thereof. If such recommendation is against the granting of the variance, a hearing shall be held thereon

section 51.32(f) of the Agency's regulations which provides:

> (f) A State's determination to defer the applicability of any portion(s) of the control strategy with respect to such source(s) will not necessitate a request for postponement under this section unless such deferral will prevent attainment or maintenance of a national standard within the time specified in such plan: *Provided, however,* That any such determination will be deemed a revision of an applicable plan under § 51.6. 40 C.F.R. § 51.32(f).[6]

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within 15 days after notice to the petitioner. If the recommendation of the Director is for the granting of a variance, the Department may do so without a hearing; provided, however, that upon the petition of any person aggrieved by the granting of a variance, a public hearing shall be held thereon. A variance granted may be revoked or modified by the Department after a public hearing which shall be held after giving at least 15 days prior notice. Such notice shall be served upon all persons, known to the Department, who will be subjected to greater restrictions if such variance is revoked or modified, or are likely to be affected or who have filed with the Department a written request for such notification.

[6] 40 C.F.R. § 51.6 provides:

(a) The plan shall be revised from time to time, as may be necessary, to take account of:

(1) Revisons of national standards,

(2) The availability of improved or more expeditious methods of attaining such standards, such as improved technology or emission charges or taxes, or

(3) A finding by the Administrator that the plan is substantially inadequate to attain or maintain the national standard which it implements.

(b) The plan shall be revised within 60 days following notification by the Administrator under paragraph (a) of this section, or by such later date prescribed by the Administrator after consultation with the State.

(c) The plan may be revised from time to time consistent with the requirements applicable to implementation plans under this part.

The Fifth Circuit in overturning the Agency's approval of the Georgia plan, held that the Agency exceeded its authority in approving a plan which permitted the state to grant variances prior to the effective date of the mandatory attainment deadlines.

The gravaman of this case is whether the Clean Air Act, 42 U.S.C. § 1857 *et seq.*, delegates to the Administrator, Environmental Protection Agency, the authority under the revision provisions enumerated in section 110(a)(3) of the Act, to approve interim variances in state implementation plans, prior to the effective date of mandatory attainment deadlines. 42 U.S.C. § 1857c-5(a)(3). The Agency asserts that the revision procedures of section 110(a)(3) delegates the Agency the authority to approve state variances prior to mandatory attainment dates. On the other hand, respondent, National Resources Defense Council, Inc. ["Council"] argues that the Agency's approval of variances circumvents the provisions of section 110(f), 42 U.S.C. § 1857c-5(f). The Council contends that Congress intended section 110(f) to be the exclusive mechanism for granting variances from requirements of state implementation plans.

Thus, the pivotal question is whether states variances are controlled by section 110(a)(3) or section 110(f) of the Act.

(d) Any revision of any regulation or any compliance schedule pursuant to paragraph (c) of this section shall be submitted to the Administrator no later than 60 days after its adoption.

(e) Revisions other than those covered by paragraphs (a) and (d) of this section shall be identified and described in the next semiannual report required by § 51.7.

(f) Any revision shall be submitted only after applicable hearing requirements of § 51.4 have been satisfied.

Section 110(a)(3) requires the Agency to approve any revision of an implementation plan if that revision meets the requirements of section 110(a)(2) and if it has been adopted by the state after reasonable notice and public hearings. Section 110(a)(3) provides:

> The Administrator *shall* approve any revision of an implementation plan applicable to an air quality control region is he determines that it meets the requirements of paragraph (2) and has been adopted by the state after reasonable notice and public hearings. 42 U.S.C. § 1857c-5(a)(3) [Emphasis supplied].

Section 110(a)(2) in turn provides in pertinent part:

> (2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—
>
> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it *provides for the attainment of such primary standard as expeditiously as practicable but* (subject to subsection (e) of this section) *in no case later than three years* from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;
>
> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such

> primary or secondary standard, including, but not limited to, land-use and transportation controls; 42 U.S.C. § 1857c-5(a)(2) [Emphasis supplied].

On the other hand, section 110(f) establishes the standards by which postponement of an implemented plan's requirements may be granted. Postponements must be requested by the governor of the state and, if granted, may extend the compliance date up to one year. A determination to postpone the compliance date must be predicated by an adjudicatory hearing "on the record after notice to interested persons and opportunity for hearing". 42 U.S.C. § 1857c-5(f)(2)(A). Section 110(f) establishes that the following criteria must be met before a postponement can be granted:

> (A) good faith efforts have been made to comply with such requirement before such date,
>
> (B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,
>
> (C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and
>
> (D) the continued operation of such source is essential to national security or to the public health or welfare.

The fundamental difference between the revision authority of section 110(a) and section 110(f) is that under section 110(a) a variance can be adopted by a state after reasonable notice and public hearings. Under section 110(f) the grant of a variance must be the subject of a full adjudicatory hearing at the federal

level. The net effect of the variance under the two sections is also quite different. A revision under section 110(a) does not extend the deadline for compliance with national ambient standards; while a postponement under section 110(f) may delay compliance with the national ambient standards for up to one year.

Pursuant to section 110(a) a state's implementation plan must provide for two periods of time: an earlier period of time during which attainment of primary standards are to be achieved as expeditiously as practicable but no later than three years from approval of state implementation plans, 42 U.S.C. § 1857c-5(a)(2) [pre-attainment period]; and a later period after which the national ambient standards, having been attained, are to be maintained [post-attainment period]. 42 U.S.C. § 1857c-5(a)(3). See, *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 483 F.2d 690 (8th Cir. 1973); *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 494 F.2d 519 (2d Cir. 1974), *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* No. 72-2145 (9th Cir., Nov. 11, 1974).

During the pre-attainment period the states have the primary responsibilities for developing and implementing plans to meet national ambient standards. See, Remarks of Senator Copper, Senate Debate on S.4358, Sept. 21, 1970, Reprinted in S. COMM. ON PUB. WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS, 93d Cong., 2d Sess., 259 (1974). At the pre-attainment stage the Agency's role is to supervise the states' progress towards meeting mandatory ambient deadlines.

Reliance on the revision procedures of section 110 (a)(3) is consistent with the legislative scheme of the Act that the states shall play the leading role in controlling pollution.[7] In particular, section 110(a)(3) of the Act establishes that state and local governments have the primary responsibility in the prevention and control of air pollution at its source. 42 U.S.C. § 1857 (a)(3). *See also,* 42 U.S.C. § 1857(b)(3) providing for " . . . technical and financial assistance to State and local governments in connection with the development and execution of *their* air pollution prevention and control programs . . . ." [Emphasis supplied]. Section 107(a) of the Act further provides:

> Each state shall have the primary responsibility for assuring air quality within the entire geographic area comprising such state by submitting an implementation plan for such state which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such state. 42 U.S.C. § 1857c-2(a).

The states are required by section 110(a)(2)(A) to develop implementation plans which provide for the attainment of primary ambient air quality standards "as expeditiously as practicable but . . . in no case later than three years from the date of approval . . . " and of secondary standards "within a reasonable time". 42 U.S.C. § 1857c-5(a)(2)(A). Generally, the deadlines set for mandatory primary standards are mid-1975. To hold that the postponement provisions of section 110(f) must apply in the pre-attainment period to state variances would require the states to meet a

[7] See note 3, *supra*, and accompanying text.

stricter standard than enunciated in section 110(a)(2)'s "as expeditiously as practicable" language. 42 U.S.C. § 1857c-5(a)(2). For example, if immediately after the approval of a state implementation plan, a state decided to grant a variance, the procedures of section 110(f) would permit the state to seek only a one year postponement even though under section 110(a)(2) the state has three years to comply with the implementation plan.[8] If section 110(f) is read to cover the pre-attainment period the Act would necessarily be internally in conflict. Thus, section 110(f) in providing for a one year postponement of the mandatory date applies only to variances pertaining after the date for attainment of the national ambient air quality standards.[9]

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[8] For example, assuming section 110(f) is the exclusive procedure for granting variances and a state, such as Georgia, implements its plan effective immediately in 1972, a source of pollution which does not comply, would be required to seek a one year postponement, expiring in 1973, two years before the mandatory deadlines. Thus the one year postponement procedure could cause a source to be in violation of the standards two years prior to the effective date of attainment deadlines.

[9] That section 110(f) applies only to post-attainment variances was supported by the Council before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works wherein a representative of the Council stated that section 110(f) applied to "... any variance which would prevent attainment of a national standard . . . ." The Council's representative supported the Agency's regulations relating to its revision authority by commenting that assertion of that authority ". . . correctly provides that variances which do not threaten attainment of a national standard are to be considered revisions of a plan . . . ." *Hearings on Implementation of the Clean Air Act Amendments of 1970—Part I (Title I) Before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works*, 92d Cong., 2d Sess., ser. no. 92-H31, p. 45 & n. 51 (statement of Richard E. Ayres).

The only relevant legislative history to the question of the scope of section 110, is found in the Summary of the Provisions of the Conference Agreement on the Clean Air Amendments of 1970 presented by Senator Muskie, as one of the amendment's sponsors. In the Summary, the procedures of section 110(f) are described as being applicable only when the mandatory three year deadline would be affected, and not for every delay or deferral of state-imposed requirements affecting the attainment of national standards within the statutory deadlines. The Summary, in describing the procedures of section 110(e) whereby a governor may request, at the time of submitting an implementation plan, a two-year extension to the mandatory deadlines, states:

> If, at the time of plan approval, it appears impossible to bring specific sources into compliance within three years, the Governor of the State may request an extension of the deadline up to two years. The Administrator must be satisfied that alternate means of achieving the standard have been considered (including closing down the source in question), that all reasonable interim measures will be applied, and that the State is justified in seeking the extension. S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Serial No. 93-18, 93d Cong., 2d Sess., 132 (1974).

Immediately thereafter, the Summary in describing the application of section 110(f) to the postponement of the mandatory deadline, states:

> A Governor may also apply for a postponement of the deadline if, when the deadline approaches, it is impossible for a source to meet a requirement under an implementation plan, interim control meas-

> ures have reduced (or will reduce) the adverse health effects of the source, and the continued operation of the source is essential to national security or the public health or welfare of that State. Such a postponement is subject to judicial review.

It is clear from even this meager legislative history that section 110(f) was intended by Congress to be applied only to requests for extension for the actual deadline; not for variances granted by the states during the period prior to attainment of national ambient air quality standards.[10]

II. Original Implementation Plans Under the Clean Air Act and Revisions Thereto Are To Be Treated Uniformly by the Agency Prior to the Effective Date of Mandatory Attainment Deadlines.

The Clean Air Act in sections 110(c) and (d) presents compelling language that Congress did not intend to draw a distinction between Agency approval of revisions under section 110(a)(3) and approval of original implementation plans under section 110(a)(1)-(2). 42 U.S.C. § 1857c-5(a)-(d). Section 110(d) defines "implementation plan" under the Act to include both the original and revisions to state plans to comply

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[10] The holding of the Ninth Circuit Court of Appeals supports a much broader thesis than presented here in its holding that the Agency has the authority to grant variances under the revision section 110(a)(3) even after the attainment of national ambient air quality standards. Natural Resources Defense Council, Inc. v. Environmental Protection Agency, No. 72-2145 (9th Cir., Nov. 11, 1974); *see also*, Comment, *Variance Procedures Under the Clean Air Act: The Need for Flexibility*, 15 WM. & M. L. REV. 324 (1973).

with the national ambient air quality standards. The text of section 110(d) provides:

> (d) For purposes of this chapter, an applicable implementation plan is the implementation plan, *or most recent revision* thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State. 42 U.S.C. § 1857c-5(d). [Emphasis supplied].

Section 110(c) in relevant part also provides that initial plans and revisions shall be subject to the same procedures:

> (c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State . . .
>
> . . . .
>
> . . . .
>
> If such State held no public hearing associated with respect to such *plan (or revision thereof)*, the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such *plan (or revision thereof)*, promulgate any such regulation unless, prior to such promulgation, such State has adopted and submitted a *plan (or revision)* which the Administrator determines to be in accordance with the requirements of this section. 42 U.S.C. § 1857c-5(c). [Emphasis supplied].

Sections 110(c) and (d) read together with sections 110(a)(3) and (2) reveal a visible legislative intent to subject both original implementation plans and re-

visions thereto to the same procedural requirements. See, *Delaware Citizens for Clean Air, Inc.* v. *Stauffer Chemical Co.*, Civil No. 4597 (D. Del. 1973), reported in 6 ERC 1147 (1974), while dicta to the district court's holding that it lacks jurisdiction under the Act to review revisions, stating that "Both sections 1857c-5(d) and 1857c-5(c) display clear Congressional intent to treat revisions and original plans uniformly". 6 ERC at 1149. Thus, the Act provides that implementation plans and revisions are to be adopted only after reasonable notice and public hearings at the state level, subject to Agency approval. 42 U.S.C. § 1857c-5(a)(1). While this is not an adjudicatory hearing with all the trappings of section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, the hearing must nevertheless provide adequate opportunity for public participation. See, *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495 (4th Cir. 1973); *Duquesne Light Co.* v. *Environmental Protection Agency*, 481 F.2d 1 (3rd Cir. 1973); *Anaconda Co.* v. *Ruckelshaus*, 482 F.2d 1301 (9th Cir. 1973). Cf. *Buckeye Power, Inc.* v. *Environmental Protection Agency*, 481 F.2d 162 (6th Cir. 1973).

The obligation of the state to hold hearings on implementation plans and revisions to those plans is basic to the Act's overall scheme of vesting in the states the primary responsibility for implementing and maintaining nationally established ambient air quality standards. Denial of the Agency's authority to approve interim state variances, which have been subject to public notice and hearings, cuts across the very grain of the Act's careful delegation to the states of the authority for the creation and implementation of air quality programs, and to the Agency to supervise

state compliance. Compare, 42 U.S.C. §§ 1857(a)(3), 1857c-2, 1857c-5(a)(1)(a)(2)(A)(i).

Construction of section 110(a) to authorize Agency approval of state variances plans is supported by two recent Court decisions relating to the necessity of providing variances to rules of general applicability. *In Re Permian Basin Area Cases*, 390 U.S. 747 (1968), and *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972). In both cases, the Court held that federal agencies have the authority to issue exemptions or variances even if statutory authority is silent on the issue. In *Permian Basin, supra*, the court carefully reviewed a Federal Power Commission regulation which partially exempted several gas producers from operation of the statute. Although the court acknowledged that the rate-making provisions of the Federal Power Commission do not provide for exemptions, the court held that the grant of an exemption was within the Agency's authority.

The rationale supporting the Agency's authority to grant variances has been set forth by the court in *United States* v. *Allegheny Ludlum Steel Corp., supra*, wherein the court in ruling on the Interstate Commerce Commission's authority to grant exemptions declared:

> It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances. 406 U.S. at 755.

See, *Portland Cement* v. *Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973) and *Essex Chemical Corp.* v. *Ruckel-*

shaus, 486 F.2d 427 (D.C. Cir. 1973) applying this principle to decisions of the Environmental Protection Agency involving section 111 of the Clean Air Act. See also, *United States* v. *Storer Broadcasting Co.,* 351 U.S. 192, 205 (1956) and *WAIT Radio* v. *Federal Communications Commission,* 418 F.2d 1153 (D.C. Cir. 1969) regarding application of this principle to the Federal Communications Commission.

The District of Columbia Circuit in remanding regulations involving stationary source standards for new or modified Portland Cement plans declared:

> [A] regulatory system which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to the system as a whole. 486 F.2d at 399.

Accord, *Essex Chemical Corp.* v. *Ruckelshaus, supra,* holding that the variance procedures of section 111 " . . . appear necessary to preserve the reasonableness of the standards as a whole . . . ." 486 F.2d at 433.

Flexibility in the pre-attainment stage is necessary to fulfill the statutory goal of clean air within the timetable established by the Agency under the Clean Air Act. It is this need for flexibility and its reasonableness which the First Circuit found pivotal in upholding the Agency's revision authority in the pre-attainment period. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency, supra,* 478 F.2d at 887. This need for flexibility is supported by reading sections 110(c) and (d) as necessary to preserve the reasonableness of attaining ambient standards within the national timetable. To invoke the postponement provisions of section 110(f) as the exclusive remedy for granting variances, at this stage, would be to

choke off state and Agency efforts to solve the problems of air pollution by requiring unnecessary, lengthy and time-consuming federal adjudicatory hearings. Moreover, to deny the Agency's authority to approve variances under the revision authority would be contrary to the Court's holding in *United States* v. *Allegheny Ludlum Steel Corp., supra,* that agencies possess the authority to grant exceptions when dealing with unusually complex problems.

III. Improvements of Public Health and Welfare Through the Attainment of National Ambient Air Quality Standards Is Best Encouraged by Permitting the States To Grant Variances Prior to the Mandatory Attainment Deadlines.

The First Circuit in considering the practical impact of the Agency's use of the revision authority, noted:

> A state plan may well establish emission limitations or other requirements during the preliminary period which one or more sources simply cannot initially meet. A postponement under § 1857c-5(f), besides being limited to only one year, would require meeting a stricter standard than is suggested by the 'as expeditiously as practicable' language § 1857c-5(a)(2)(A). We can see value in permitting a state to impose strict emission limitations now, subject to individual exemptions if practicability warrants; otherwise it may be forced to adopt less stringent limitations in order to accommodate those who, notwithstanding reasonable efforts, are as yet unable to comply. 478 F.2d at 887.

The First Circuit's observation merits serious consideration to the practical effects of pre-attainment stage procedures to be followed in approving state variances. One of the primary concerns of the Act's sponsors was that strict state and federal plans be im-

plemented at the earliest practicable moment. In the Senate's considerations of the Report of the Conference Committee on the amendments to the Clean Air Act [H.R. 17255, 91st Cong.], Senator Muskie stated:

> There was little doubt in the Senate, in September [1970], that the country was facing an air pollution crisis. Cities up and down the east coast were living under clouds of smog and daily air pollution alerts. More than 200 million tons of contaminants were being spilled into the air annually.
>
> . . . .
>
> Unless we recognized the crisis and generated a sense of urgency, national lead times to find and apply central measures could melt away without any chance for a rational solution to the air pollution problem. S. COMM. ON PUBLIC WORKS, A LEGISLATIVE HISTORY OF THE CLEAN AIR AMENDMENTS OF 1970, Serial No. 93-18, 93d Cong., 2d Sess. 124-125 (1974).

The Agency's promulgation of 40 C.F.R. § 50.32(f) involving the revision authority should be viewed as encouraging the immediate implementation of strict ambient air quality standards. The regulations encourage the states to put into force strict standards as expeditiously as practicable, allowing exemption only for those who cannot technologically and practically meet the standards.

The Agency's revision regulations are the foundation upon which strict state implementation plans have been based. Conversely, if the postponement provisions of section 110(f) are the exclusive variance procedure, weaker state plans would have been encouraged in contravention of the Act's very *raison d'etre*.

Reliance upon section 110(f) as the exclusive variance procedure would further thwart the expeditious attainment of national ambient standards, by injecting substantial delay in reaching those standards. The rationale of the District Court in *Delaware Citizens* v. *Stauffer Chemical, supra,* while dicta to the court's holding that it lacked jurisdiction to review certain acts of the Agency, is persuasive in discussing the effect of subjecting every state request for pre-attainment variances to the federal hearing provisions of section 110(f). The court declared:

> If every revision in a control strategy, whether or not it will prevent attainment of the national standard by the date specified in the plan, necessitated a federal hearing and review by § c-5(f) standards, it could be expected that states would approach the setting of ambitious control strategies with great caution. Regulation 51.32(f) avoids this pitfall and, at the same time, it provides maximum state involvement in control strategy revisions which will not interfere with attainment of a national standard. 6 ERC at 1151.

The delay which would result if every state pre-attainment variance necessitated an adjudicatory hearing in the federal level would be insurmountable.[11]

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[11] For example, if the Fifth Circuit decision were upheld the Agency would arguably be required to hold formal public adjudicatory hearings for over 800 variances granted under the Georgia state plans, most of which have already been subject to a state hearing. The magnitude of the number of hearings required if multiplied by the 50 states becomes gargantuan. Moreover, the ensuing delays would thwart the Act's very purpose of implementing standards as "expeditiously as practicable". Delays in the holding of federal hearings could run into years. *See, e.g.*, Request Submitted by Governor of West Virginia under section 110(f); hearing held in January, February and October 1974, for which a decision is still pending.

Moreover, recourse to a federal adjudicatory hearing at the pre-attainment stage runs counter to the Act's goal of attaining national ambient air standards as expeditiously as possible , [42 U.S.C. § 1857c-5(a)(2)] since the result mandated by section 110(a) is postponement of the effective date of the standards for up to one year.

Concurrent with weakening state implementation plans and delaying the attainment of national ambient air quality standards, the practical effect of relying upon section 110(f) as the exclusive variance procedure, would be the disruption of current implementation programs. The states, and industry within those states, have relied upon the Agency's revision authority in planning pollution control programs. See, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965) holding that where an agency interpretation has been a matter of public record and where reliance on the regulation has been at great expense, the Agency's interpretation should be given "great deference" and upheld. 401 U.S. 424, 433-434 and 380 U.S. 1, 16-18. To deny the use of the revision procedure as established by 40 C.F.R. § 51-32 in the pre-attainment period would disrupt the orderly progress now underway, to meet the national ambient air quality standards, generally set for mid-1975. The revision authority asserted here does not affect the deadline for compliance with national standards, and as such the revision authority must not be construed to proscribe approval of interim variances prior to the attainment date.

CONCLUSION

Therefore, for the foregoing reasons, the decision of the Court of Appeals for the Fifth Circuit, as it pertains to the Agency's authority to approve state

variances under section 110(a)(3), 42 U.S.C. § 1857c-5(a)(3) prior to the mandatory attainment date for national ambient air quality standards, should be reversed.

Respectfully submitted,

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